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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, *et al.*,

Petitioners,

vs.

JOHN DOE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**AMICUS CURIAE BRIEF OF
JAMES K. T. HUNTER IN
SUPPORT OF RESPONDENTS**

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INTEREST OF THE AMICUS CURIAE

Amicus is an attorney who is presently engaged in litigation on behalf of one of his clients, Keeley Tatsuyo Hunter, against Petitioner The Regents of the University of California ("Regents") in the United States District Court for the Central District of California. Regents has asserted Eleventh Amendment immunity from suit in federal court in defense of certain claims in this litigation, with amicus arguing that Regents is not entitled to such immunity. One of the key propositions which amicus contends negates Eleventh Amendment immunity

for Regents is the state treasury's lack of legal liability for *any* judgment against Regents.

In reviewing the Court of Appeals' decision, amicus noted that both the majority and dissent assume, implicitly and explicitly, respectively, that in the absence of any claim for reimbursement or indemnity from the federal government or other third party, the state treasury is legally liable for a judgment against Regents. This assumption, which is demonstrably erroneous, constitutes important, if not crucial, support for the further erroneous assumption in Petitioners' "QUESTION PRESENTED" that Regents "otherwise would be considered part of the State or an 'arm of the State' and thereby immune from suit in federal court under the Eleventh Amendment." Accordingly, because of the importance to amicus' client of ensuring that this Court does not in whole or in part premise its determination as to Regents' Eleventh Amendment immunity on the preceding, and interrelated, erroneous assumptions, this brief is submitted to assist the Court in its resolution of this case.¹

SUMMARY OF ARGUMENT

The two principal concerns which govern whether the Eleventh Amendment shields an entity from suit in federal court are (a) liability of the state treasury for a judgment against the entity and (b) the level of control which the State exercises over such entity. While the Court of Appeals' decision focused on the economic impact of a judgment rather than on the legal liability of the State, the propriety of that focus is irrelevant to the decision's

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

correctness since, in any event, the state treasury is not legally liable for a judgment against Regents. With regard to control, the lines of oversight of the elected state government are not only indirect and insubstantial, but any political accountability to the State is constitutionally prohibited.

Thus, the assumption in Petitioners' "QUESTION PRESENTED" that Regents "otherwise would be considered part of the State or an 'arm of the State' and thereby immune from suit in federal court under the Eleventh Amendment" is erroneous. Regents is not an "arm of the State" entitled to Eleventh Amendment immunity from suit in federal court without regard to any claim it has for reimbursement or indemnity from the federal government or other third party.

ARGUMENT

REGENTS IS NOT AN ARM OF THE STATE WITHOUT REGARD TO ANY CLAIM IT HAS FOR REIMBURSEMENT OR INDEMNITY FROM THE FEDERAL GOVERNMENT OR OTHER THIRD PARTY

As the Fourth Circuit noted in *Gray v. Laws*, 51 F.3d 426, 434 (4th Cir. 1995), this Court's decision in *Hess v. Port Authority Trans-Hudson Corporation*, 115 S.Ct. 394 (1994), although specifically addressing the Eleventh Amendment's application to the multistate entities created under the Compact Clause, wrought more than "inconsequential" changes to that Circuit's (and also the Ninth Circuit's) Eleventh Amendment analysis as they bear on single state issues. In

particular, *Hess* clearly places primary (and arguably determinative) emphasis on the vulnerability of the State's purse (*see id.* at 115 S.Ct. at 404 [acknowledging that "vulnerability of the State's purse" is generally considered the "most salient" factor] and at 115 S.Ct. at 410 [O'Connor, J. dissenting, characterized majority as holding that "vulnerability of the state treasury is determinative"]), with secondary emphasis being accorded by the majority (and primary emphasis by the dissent) to control.

The Court of Appeals' decision does not cite *Hess*, nor does it indicate any consideration of the impact of that decision on either (1) the viability and proper application of the five-factor analysis applied below or (2) the continued force of prior decisions which had accorded Eleventh Amendment immunity to Regents. In addition, both the majority and dissent assume, implicitly and explicitly, respectively, that the state treasury is legally liable for a judgment against Regents. *Doe v. Lawrence Livermore Nat. Laboratory*, 65 F.3d 771, 775, 777 (9th Cir. 1995) [majority: "previous grants of immunity in contexts where the State of California is financially responsible for the University do not automatically translate into immunity in this unique situation"; dissent: "No one has disputed that a judgment against the University of California is a legal obligation of the State of California"].

As explained below, the combined effect of the above-mentioned aspects of the Court of Appeals' decision is that it reaches the right result for the wrong reasons. More particularly, Regents is not entitled to Eleventh Amendment immunity from suit in federal court without regard to any claim it has for reimbursement or indemnity because (1) the state treasury is never legally liable for any judgment against Regents and (2)

the lines of oversight of the elected state government are not only indirect and insubstantial, but any political accountability to the State is constitutionally prohibited.

A. The State Treasury Is Not Legally Liable For A Judgment Against Regents Under Any Circumstances

In their "SUMMARY OF ARGUMENT," Petitioners state as if it were uncontrovertible fact that "[a] judgment against the University would be a legal obligation of the State of California." (Brief for Petitioners, p. 10.) In the "ARGUMENT," however, Petitioners' support for that assertion turns out to consist solely of (1) various conclusory assertions by Judge Canby in dissent based on the fact that "[n]o one has disputed that a judgment against the University of California is a legal obligation of the State of California" (*Doe*, 65 F.3d at 777) and (2) the failure of the Court of Appeals to "take issue with Judge Canby's conclusion that the State will be legally liable for any judgment rendered against it." (Brief for Petitioners, p. 21.)

In fact, as Regents' counsel unquestionably well knows, California law provides that, *uniquely among all state public entities*, a judgment against Regents is *not* a legal obligation of the State of California. California Government Code §§ 905.6, 943 and 965.9.² See

² These sections provide in full as follows:

Section 905.6

"This part [California Government Code §§900, *et seq.*, dealing with claims against public entities] does not apply to claims against [Regents]."

(continued)

generally, 35 Cal.Jur.3d (Rev.), Part 2, Government Tort Liability §130, at p. 241 ["The provisions governing the payment of claims and judgments against the state, however, do not apply to claims, settlements, and judgments against [Regents]." (Footnotes omitted.)]. Thus, this "most salient" of the *Hess* factors strongly supports, if not itself compels, the conclusion that Regents is not entitled to Eleventh Amendment immunity from suit in federal court.³

(fn. continued)

Section 943

"This part [California Government Code §940, *et seq.*, dealing with actions against public entities and public employees] does not apply to claims or actions against [Regents] nor to claims or actions against an employer or former employer of [Regents] arising out of such employment."

Section 965.9

"This chapter [California Government Code §§965, *et seq.*, dealing with payment of claims and judgments against the State of California] does not apply to claims, settlements, and judgments against [Regents]."

³ At one point in *Hess*, the Court describes the state treasury liability concern as whether the State is obligated to bear and pay the indebtedness resulting from an excess of expenditures over receipts "both legally and practically." *Hess*, 115 S.Ct. at 406. Yet the Court offers no guidance as to how a "practical" obligation is to be distinguished from a "legal" obligation. Amicus would respectfully suggest that there is and can be no uniform answer as to the State's "practical obligation" to pay all or any portion of such an indebtedness, and that whether the State in fact did so would depend on numerous factors and circumstances, including, but by no means limited to, the size of the indebtedness, the health of the state

(continued)

B. The Lines Of Oversight Of The Elected State Government Over Regents Are Not Only Indirect And Insubstantial, But Any Political Accountability To The State Is Constitutionally Prohibited

As Justice Brennan observed in his concurring opinion in *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 314, 110 S.Ct. 1868, 1877 (1990):

"The rule to be derived from our cases is that the Eleventh Amendment shields an entity from suit in federal court only when it is so closely tied to the State as to be the direct means by which the State acts, for instance a state agency. In contrast, when a State creates subdivisions and imbues them with a significant measure of autonomy, such as the ability to levy taxes, issue bonds, or own land in their own name, these subdivisions are too separate from the State to be considered its 'arms.' This is so even though these political subdivisions exist solely at the whim and behest of their State."

(fn. continued)

treasury, the mood of the public, the explanation for Regents having incurred the indebtedness and the attitude of the legislature and governor toward Regents, raising taxes and/or cutting government spending.

More recently, in *Hess*, Justice O'Connor, in dissent, commented on the control test as follows:

"An arm of the State, to my mind, is an entity that undertakes state functions and is politically accountable to the State, and by extension, to the electorate. The critical inquiry, then, should be whether and to what extent the elected state government exercises oversight over the entity. If the lines of oversight are clear and substantial — for example, if the State appoints and removes an entity's governing personnel and retains veto or approval power over an entity's undertakings — then the entity should be deemed an arm of the State for Eleventh Amendment purposes." 115 S.Ct. at 411 (1994) (O'Connor, J., dissenting).

Applying the foregoing control tests to Regents, and in particular contrasting the results of those tests with those which obtained in *Hess*, the conclusion is inescapable that Regents does not qualify for Eleventh Amendment immunity thereunder, even as such tests were applied by the dissenting Justices in *Hess*. In *Regents of the University of California v. Superior Court of Alameda County (Regan)*, 17 Cal.3d 533, 537 (1976), the California Supreme Court cited article IX, section 9, of the California Constitution for the proposition that "the University is intended to operate as independently of the state as possible." *Id.* Indeed, although the California Constitution provides that eighteen of the twenty-five members of the Regents' board are to be

appointed by the Governor, with the approval of a majority of the Senate,⁴ it further provides that "[t]he university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs. . . ." California Constitution, art. IX, §9(f). Further, there is no express right of removal (contrary to what appears to have been the case in *Hess*, 115 S.Ct. at 411), and no veto power by the elected state government over Regents' actions.

In sum, not only is Regents imbued with, at the least, "a significant measure of autonomy," but the "elected state government" exercises only indirect and insubstantial oversight over Regents — and even that oversight is constitutionally required to be entirely free of all "political" influence. Thus, with respect to Regents, both the state treasury liability and control tests point in the same direction, and against any Eleventh Amendment immunity being accorded Regents from suit in federal court.

⁴ The remaining seven *ex officio* members are the Governor, the Lieutenant Governor, the Speaker of the Assembly, the Superintendent of Public Instruction, the president and vice president of the alumni association of the university and the acting president of the university. California Constitution, article IX, §9(a).

CONCLUSION

In essence, the Court of Appeals' decision constitutes an extended analysis of the implications of a key erroneous assumption — namely: that the state treasury is legally liable for a judgment against Regents. Because of this erroneous assumption, neither the majority's nor the dissent's opinions (nor the Brief of Petitioners) analyzes whether Regents qualifies for Eleventh Amendment immunity under the actual state of the law (i.e., where the state treasury is *not* legally liable for a judgment against Regents). As a result, this Court would certainly be justified either (1) in remanding this case to the Court of Appeals for reconsideration in light of the State purse's nonvulnerability to a judgment against Regents or (2) finding that certiorari was improvidently granted. Amicus submits, however, that Regents' failure to satisfy the criteria for Eleventh Amendment immunity is clear, and that this Court, albeit for different reasons than were stated by the Court of Appeals, should affirm its decision.

DATED: September 26, 1996.

Respectfully submitted,

JAMES K. T. HUNTER

Amicus Curiae